IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DONALD COLE,	:	
	:	
Defendant Below,	:	
Appellant,	:	Supreme Court No. 425, 2004
	:	
v.	:	
	:	
STATE OF DELAWARE	:	Superior Court I.D. 0309013358
	:	
Plaintiff Below,	:	
Appellee.	:	

Submitted: December 20, 2005
Decided: March 14, 2006

DECISION UPON REMAND

This matter has been remanded to this Court to answer questions related to the admissibility of the evidence derived from the State's use of defendant Cole's statement in investigating the charges ultimately lodged against him.

The facts underlying this remand are set forth in the Supreme Court's decision[1] and in the suppression decision issued on April 21, 2004.[2] In sum, defendant Donald Cole ("Cole") was indicted with two others: Travanion Norton ("Sticky") and Larry Johnson, on charges of murder arising from a double murder on 23rd Street in Wilmington, Delaware. Ballistics linked the 23rd Street crime with an attempted murder that occurred on Lancaster Avenue, in Wilmington, Delaware, nine days before the 23rd Street murders. The State charged Cole and Elwood Hunter ("Hunter") in the Lancaster Avenue crime. The trial of that case was underway when the statement in question was

[1] *Cole v. State*, 2005 WL 2805562 (Del. Supr.)
[2] *State v. Cole and Johnson*, Del. Super., I.D. Nos. 0309013358, 0309013375, Del. Pesco, J. (Apr. 21, 2004) (Mem. Op.)

taken. The prosecutor in both cases was Deputy Attorney General Daniel Miller. Cole was represented by Brian Bartley, Esquire.

Questions on Remand

1. Did Cole and Miller enter impliedly or explicitly into any agreement before the proffer limiting the State's use of Cole's statement to consideration of death penalty eligibility?

Answer: Yes, Cole and Miller agreed **before** the proffer that the proffer would be used in **two** ways.[3]

First, they implicitly agreed that the statement would be used to determine whether the State would dismiss the charges against Hunter who was likely to be wrongly convicted. I reach that conclusion from the context of events. The Lancaster Avenue trial was nearly complete. After the testimony of an eyewitness who emphatically identified Hunter as one of the perpetrators, Cole indicated to his attorney that Hunter was not the second participant in the crime. He wanted to take steps to prevent Hunter's conviction. Cole volunteered to give a statement. The statement in question is 45 pages long. The discussion does not turn to 23rd Street until page 25. Clearly, the first concern was true culpability for Lancaster Avenue. With jeopardy having attached to Hunter, the State had a critical decision to make.

Second, Cole and Miller explicitly agreed that the State would use the statement to evaluate the propriety of waiving the death penalty in connection with the prosecution of the 23rd Street double murders. After the statement was taken, Miller informed Bartley that it would have to be "corroborated."[4] Bartley inferred, but does not say he was told,

[3] Hearing on Motion to Preclude Capital Proceeding., 40:4-15, Feb. 27, 2004.
[4] Hearing on Motion to Preclude Capital Proceeding., 56: 5-23, 57:1-4, Feb. 27, 2004.

that the State would waive the death penalty if the statement were determined to be true.[5] No objection has ever been raised about the State's post-statement condition of corroboration.

Because the trial in the Lancaster Avenue case was in recess when the statement was taken from Cole, Bartley asked for and was given the assurance that the statement would have Delaware Rules of Evidence 410 protection.[6] That protection became moot as to Lancaster Avenue once Cole entered his plea later the same day. It continued to apply to the 23rd Street crimes. When Cole was sentenced for 23rd Street on March 28, 2003, the colloquy was punctuated by the limitations of that commitment.[7]

2. What does Miller's statement at the end of Cole's interrogation signify?

a. Does it further clarify the deal, if any, between the parties that existed before the proffer? Or does it relate only to Cole's concern that other people involved in a homicide might find out about it and then come after him, or "do something else?"

b. In either case, what is the significance of the prosecutor saying one thing ("we won't talk about this with anyone else") and authorizing the police to do the opposite (confronting Norton and Johnson with Cole's statement)? More specifically, did the parties have any reason to believe that the bargain into which they entered before Cole made his statement included a limitation on its use and did the State violate the implied covenant of good

[5] Hearing on Motion to Preclude Capital Proceeding, 56:14-23, 57:1-4, Feb. 27, 2004.
[6] Hearing on Motion to Preclude Capital Proceeding, 82: 5-23, 83:1-5, Feb. 27, 2004.

faith and fair dealing by acting contrary to Cole's reasonable expectations of the "deal?"

Answer:

At the outset of the interview Miller said:

> …the deal right now is that we are going to take uh a [proffer] statement of what you have to say about anything we ask you about and I'm going to take that statement back to my superiors and discuss with them whether to make you an offer where you would be spared capital punishment. Do you understand that?[8]

At the end of the interview Miller said:

> DM: We'll we'll [sic] terminate this and uh I'm gonna [sic] go back to my office and do what I told you I was gonna do [at] the beginning of this interview. Okay and uh obviously this conversation is not over we'll pick it up. **Plus** you don't want us to discuss the substance of this outside this room. Yeah we're not gonna talk about this with Sticky or Larry Johnson or anybody else. I I [sic] understand what you're saying, but listen [while] this is still ongoing there's a reason why we want that. We know what you're saying to us and we [sic] we're gonna hold up our end. But listen we can't have anybody [know] it the less people know the less it's gonna leak out there.
> A410: I think Sticky already knows.
> Q411: Why do you know that?
> A411: Cause we talked.
> Q412: Alright well let's not from now on [sic] don't talk about it.[9]

The record shows that on January 15, 2003, the day after the statement was taken, Miller wrote an e-mail to Bartley confirming the events that had transpired the preceding Monday and Tuesday, January 13 and 14. In that e-mail Miller says, *inter alia*, that Bartley "expressed a concern about the admissibility of any statement your client might provide and we agreed that the statement was in pursuit of settlement negotiations and thus protected by D.R.E. 410. We subsequently took the proffer and I returned to my

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[7] Sentencing Proceedings, 17, 19, 25, Mar. 28, 2003.
[8] Cole's Stmt. to New Castle County Police, 1, Jan. 14, 2003.
[9] Cole's Stmt. to New Castle County Police, 44, Jan. 14, 2003.

office."[10] Miller asked that Bartley confirm his agreement with the summary provided in the e-mail.

Two weeks later Miller sent another e-mail urging Bartley to confirm the understanding set forth in the January 15, 2003, e-mail "before memories fade."[11] It was not until February 28, 2003, that Bartley responded in an e-mail. The message says: "This is an accurate and comprehensive summary of the salient points with one point of amplification or clarification, namely that Mr. Cole's statement would not be used against him for either trial or investigative purposes."[12] By saying that, Bartley was endorsing Miller's earlier e-mail about D.R.E 410. Bartley later testified that the 410 discussion arose after the statement was given.[13] Miller responded on February 28, 2003, saying, "The response you just sent added a potential issue. Namely, what do you mean when you say 'investigative purposes?' Please respond promptly."[14]

Bartley responded the same day:

> I do not believe that a potential issue is added.
>
> My use of the language "investigative purposes" serves only to confirm that no one involved expected that Mr. Cole's statement would be used in any way to advance the potential prosecution of him for the homicides.
>
> If the death penalty is not waived as proposed, his prosecution must proceed as though the statement made during settlement negotiations was never given.[15]

Miller testified that he was angry when he received that e-mail, and confronted Bartley about it. Bartley reassured him that he was in agreement regarding the use of the statement, and that, "he never liked the idea of Cole giving the statement, but that Cole

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[10] E-mail from Daniel R. Miller to Brian J. Bartley (Jan. 15, 2003 15:05 EST)
[11] E-mail from Daniel R. Miller to Brian J. Bartley (Jan. 29, 2003, 11:27 EST)
[12] E-mail from Brian J. Bartley to Daniel R. Miller (Feb. 28, 2003, 15:17 EST)
[13] Hearing on Motion to Preclude Capital Proceeding, 53:21-23, 54:1-2, Feb. 27, 2004.
[14] E-mail from Daniel R. Miller to Brian J. Bartley (Feb. 28, 2003, 14:55 EST)

seemed like he had, begin quote, a moral imperative, end quote…that was leading him to make the decision, to exculpate Hunter to reduce the risk of capital punishment to himself."[16] Miller wrote an e-mail, dated March 3, 2003, noting his disagreement with Bartley's characterization of the agreement.[17]

In spite of the difference in opinion documented by the e-mails, Chaffin was permitted to use the statement to secure the cooperation of Norton.

Bartley's February 28, 2003, statement about his expectations is not supported by the December 4, 2003 affidavit[18] from the defendant, written in support of the motion to preclude the death penalty. He says:

> 6. I talked with Mr. Bartley about making a statement about the 23rd Street murders. I knew I had a right not to make any statement. Mr. Bartley explained to me that he could not get me an up front deal to avoid the death penalty in exchange for my statement. However, Mr. Bartley did explain that the State would agree not to seek the death penalty against me if the information I provided turned out to be the truth.
>
> 7. After receiving this advice from Mr. Bartley, I understood the following: that if I made a statement about the 23rd Street murders, the State would then **check my statement to see if it was true**. The State wanted an opportunity to **check out what I told them** before making a guarantee of no death sentence. I understood that if I was truthful, then the State would not seek to execute me. Based on that understanding, I waived my right to keep silent and told the prosecutor and the police officer the truth about the 23rd Street murders. At the time, I realized that I would limit my chances to defend the 23rd Street murders by making a statement which described my participation. In other words, **I knew my confession would likely get me convicted**, but I understood that if I told

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[15] E-mail from Brian J. Bartley to Daniel R. Miller (Feb. 28, 2003, 17:45 EST); *See also* Trial Tr., 98: 16-23, Feb 27, 2004.

[16] Hearing on Motion to Preclude Capital Proceeding, 71:12-20, Feb. 20, 2004.

[17] "Let me start by saying that I am hopeful no problems arise out of this. But I must add that I disagree with your recall of our discussions. There was no agreement that 'his prosecution must proceed as though the statement made during settlement negotiations was never given.' Rather, we expressly agreed that his statement was made pursuant to settlement negotiations and thus Mr. Cole statement was protected by the provisions of D.R.E. 410."
E-mail from Daniel R. Miller to Brian J. Bartley (Mar. 3 2003, 9:35 EST)

[18] The affidavit was signed by Cole's counsel, Brendan O'Neill, on December 4, 2003, then signed by Cole in open court on February 27, 2004.

> the truth, I would be spared the death penalty. If I did not have the understanding that my truthful statement would spare me the death penalty, I would never have made the statement.
>
> * * *
>
> 9. I have been told that my statements about the 23rd Street murders have been **checked out and proved truthful**. Therefore, I want the benefit of the deal I understood I made with the State. I did my part. I told them the truth. The State checked it out. Now the State should drop the death penalty.[19]
> (emphasis supplied)

It is important to note that this affidavit was submitted by the defendant twelve months after the charges against Hunter had been dropped. The pending matter related to 23rd Street. The defendant's motion to preclude the death penalty ("death waiver motion") was supported by the affidavit. The use of Cole's statement with Norton was well known by then. The affidavit does not claim misuse of Cole's statement. To the contrary, Cole knew that the statement would be "checked out."

The first part of Miller's statement at the end of Cole's interrogation records the fact that the "conversation is not over we'll pick it up,"[20] and the State would use it to consider a waiver of the death penalty.

The language beginning with **Plus**[21] causes the problem. When questioned about his comment at the hearing on the death eligibility motion, Miller testified:

> Q. Okay. And you said, "Yeah, we're not going to talk about this with Sticky or Larry Johnson or anybody else."
>
> Now, you did talk about it with Sticky and Larry Johnson; right?
>
> A: Ultimately, yes, but the concern that's being addressed there is the natural concern of a person that was in Donald Cole's situation at the time. He's in jail, Johnson is in jail and Sticky's in jail. He's now implicated them in a double homicide.
>
> That's what that directs to. It has nothing to do with any conversation that Brian Bartley and I had prior to entering the room. Flat out no way.

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[19] Cole's Aff. ¶ 6, ¶ 7, ¶ 9, Dec. 4, 2003.
[20] Cole's Stmt. to New Castle County Police, 44:DM, Jan. 14, 2003.
[21] *See supra* p. 10.

Q. It says, "I understand what you're saying, but listen, while this is still an ongoing, there's a reason why we want that."
A. I did say that.

Q. "We know what you're saying to us."
A. Correct.

Q. "And we're going to hold up our end."
A. Correct.

Q. All right.
A. What are you suggesting that that means?

Q. Well, I'll ask you the questions. . . .You told Mr. Cole and Mr. Bartley that you weren't going to take the statement outside and discuss it with anybody?
A. Incorrect. The express purpose of the statement was, it was known to Mr. Cole before we took the statement that I was going to take it to other people, including, for example, the senior staff.

THE COURT: I think if you read the balance of the page, it sheds a little light on it.
A: Thank you, Your Honor.
That's a good point. The – Mr. Cole is picking up on the context of it too and says, "I think Sticky already knows," which establishes that the context was who in the prison might find out about this.

THE COURT: That comment, "I think Sticky already knows," how do I know who's saying that?
A: Because I'm talking. . . .I can tell you, Your Honor, that this conversation is between myself and Mr. Cole. And he expresses – he picked up, he knows the context, because he acknowledges that Sticky already knows.[22]

The remand asks me to determine the significance of the prosecutor saying one thing and authorizing the police to do the opposite. The statement assumes facts which I do not find to be true. The State's interest in not talking to Sticky and Larry Johnson was related to Cole's personal security. That conclusion is supported by Cole's reaction, "I think Sticky already knows," and Miller's testimony explaining his intent.[23] Bartley does

[22] Hearing on Motion to Preclude Capital Proceeding, 81:5-23, 83:1-12, Feb. 20, 2004.
[23] Hearing on Motion to Preclude Capital Proceeding, 82:20-23, 83:1-15, Feb. 20, 2004.

not contradict that interpretation.[24] Bartley was present when the statement was given. If the issue was something as critical as is now claimed, he could have spoken up.

When Cole gave the statement, he knew of the ballistics link between Lancaster Avenue and 23rd Street, and he knew that by giving the statement he "would likely be convicted."[25] After the statement was taken, he knew the State would corroborate the statement and then decide whether or not to waive the death penalty.

Contract principles apply to the interpretation of agreements in criminal cases. The terms of a contract are established before it is formed, not after.[26] Other than Miller's language at the END of the proffer, there is nothing until an e-mail created six weeks after the proffer was taken, to support the assertion that the statement was to be used in a restricted manner. The very idea of corroboration belies such an agreement. Corroborate is defined: to strengthen, to make the validity or more certain; confirm; bolster; support.[27] Defendant does not deny knowledge that the statement was to be corroborated. The logical way to corroborate Cole's statement was to return to the scene of the crime to collect additional evidence, and to confront the other perpetrators of the crime with his statement. Both were done.

The present argument regarding the investigative limitation on the use of the statement arose because Miller's language at the end of the statement is subject to misinterpretation, because the State did not put the terms of the proffer in writing in advance of the proffer as was carefully done with Norton, and because the State's

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[24] At the hearing on the motion to preclude the death penalty, Bartley does not address the meaning of the language in dispute here. Miller did.
Hearing on Motion to Preclude Capital Proceeding, 81:5-23, 83:1-12, Feb. 20, 2004.
[25] Cole's aff. ¶ 7, Dec. 4, 2003.
[26] *Bouchard Margules and Friedlander v. Gaylord*, 2005 WL 2660043 (Del. Super. Ct.) (citing *Leeds v. First Allied Connecticut Corp.,* 521 A.2d 1095, 1097 (Del. Ch. 1986)).
[27] Webster New World Dictionary, 319 (2nd College Ed. 1980).

sloppiness has created an opportunity for Cole to escape responsibility for the double murder that a jury has convicted him of committing.

Cole's present lack of candor is demonstrated by the Rule 61 he has recently filed, *pro se*. He states as ground two:

> Coerced confession; prosecution and defense counsel came together in a persuade [sic] manner of threating [sic] movant to plea guilty to the within offense(s) in which movant now bring's [sic] before this court. Prosecution and defense counsel made deal behind movant back, movant having no knowledge of what defense counsel said or did with prosecution whereas counsel support prosecution in getting criminaling [sic] statement(s) from movant to support conviction.[28]

Little is certain in this case, but the fact that Bartley counseled against the proffer has never been disputed.

The voluntary nature of the statement, given against advice of counsel, the corroboration requirement;[29] the explanation of Miller; the post-statement arrival of the "investigative purposes" limitation; Cole's affidavit where he says that he knew the State would check out the statement, and that he would be convicted of the 23rd Street murders; lead me to conclude that the limitation on the use now asserted was not contemplated at the time the proffer was taken.

I conclude that the agreement before and after the proffer was that the only limitation on the use of the statement was D.R.E. 410. The State did not breach the deal with Cole.

3. Did Cole detrimentally rely on the State's promise to use his statement for a limited purpose, if it did so promise before the proffer, before making his statement.

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[28] *State v. Cole*, Super. Ct., ID 0110006694A, Dkt. No. 37, at 3, (Feb. 10, 2006).
[29] Hearing on Motion to Preclude Capital Proceeding, 56:5-23, 57:1-4, Feb. 27, 2004.

Answer: No. Cole gave his statement because he felt a "moral imperative" not to let Hunter be convicted of Lancaster Avenue, or charged with 23rd Street, and he hoped to escape the death penalty.[30]

4. If an agreement existed and Cole relied on it to his detriment, and the State breached the agreement, what remedy applies? Would specific enforcement of the agreement require a new trial or, given the weight of the evidence, would Cole have been convicted without Norton's testimony?

Answer: No agreement existed that the State would use the proffer for the limited purpose now asserted, i.e., not talk to the other perpetrators.

This matter is now returned to the Supreme Court for its further consideration.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary
xc: Chief Justice Myron T. Steele
Justice Carolyn Berger
Justice Henry duPont Ridgely
Jan A.T. vanAmerongen, Esquire
Michael C. Heyden, Esquire
John R. Williams, Esquire, Deputy Attorney General, Department of Justice

[30] Hearing on Motion to Preclude Capital Proceeding, 71:12-20, Feb. 20, 2004.